81-1353

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No.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1981.

GABRIEL ROBERT CAGGIANO
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Appeals have jurisdiction to decide an interlocutory appeal of an order disqualifying the United States Attorney and his office from prosecuting the defendant on the grounds that the appearance of propriety would be offended because the defendant's lawyer left the defendant during the prosecution and accepted employment as an Assistant United States Attorney in that office.

The defendant agrues that the Court of Appeals has no jurisdiction under the recent holdings of this Court in United States v. MacDonald, 435 U.S. 850 (1977) and Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981).

2. Do the canons of professional ethics permit the disqualification of the United States Attorney's office under conditions which call for the disqualification of an Assistant United States Attorney and would under similar circumstances require the disqualification of the office of a private attorney.

3. Was the trial judge in error as a matter of law in the exercise of his discretion

wherein he disqualified the office of the United States Attorney to avoid the appearance of impropriety where the defendant's attorney who had represented him for over three years and throughout one trial which has terminated because of a hung jury and through the pretrial stages of a second trial before accepting an appointment as an assistant in the office of the prosecutor.

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for the Western District of Tennessee.

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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1981

No._____

GABRIEL ROBERT CAGGIANO,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent,

.PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioner Gabriel Robert Caggiano respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit

entered in this proceeding on September 17, 1981.

OPINION BELOW.

The opinion below is an appeal from the United States District Court for the Western District of Tennessee in the Court of Appeals For The Sixth Circuit. The full text of this opinion is included in the appendix (A1-A18).

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 17, 1981. A timely petition for rehearing en banc was denied on October 23, 1981, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291 to hear Government appeal from a District Court Order granting Petitioner's motion to disqualify the United States Attorney's Office for the Western District of Tennessee from prosecuting him be-

cause his former defense counsel became an Assistant United States Attorney in that Office.

2. Whether ethical considerations mandated that the United States Attorney's Office for the Western District of Tennessee was disqualified from prosecuting Petitioner since his former defense counsel became an Assistant United States Attorney in that Office.

3. Whether the District Court acted within its discretion when it disqualified the United States Attorney's Office for the Western District of Tennessee from prosecuting, Petitioner because his former defense counsel became an Assistant United States Attorney in that Office.

STATUTORY PROVISIONS INVOLVED.

United States Code, Title 28: §1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE.

On October 13, 1977, a federal grand jury sitting in the Western District of Tennessee returned a 17-count indictment charging the Petitioner (defendant below) and Raymond W. Baszner, J. Lawrence Wolfson, and three other co-defendants with mail and wire fraud, interstate transporation of stolen and fraudulently obtained property, and conspiracy to commit these offenses. The alleged victim of these charges was the late Elvis A. Presley, a resident of Memphis, Tennessee and a local and national singer and folk hero. At an August 1978 trial on these charges, the jury was unable to reach a verdict as to any of the counts against the Petitioner. On the request of the Petitioner the court declared a mistrial.

In November 1978, a superseding indictment was returned which charged the Petitioner with essentially the same crimes alleged in the original indictment. On August 15, 1979, the Petitioner and Baszner filed motions to dismiss the superseding indictment, claiming that their retrial would violate the Double Jeopardy Clause of the Fifth Amendment. The district court denied these motions; the Petitioner appealed. These

issues were argued in the Court of Appeals for the Sixth Circuit on June 4, 1980.

On May 16, 1980, while those appeals were pending in the Court of Appeals, Phil Canale, counsel for the Petitioner, who had represented the Petitioner at his first trial, had handled the pretrial aspects of the superseding indictment and had been active in the appeal, was offered and accepted a position as an Assistant United States Attorney in the United States Attorney's Office for the Western District of Tennessee, the Office prosecuting the Petitioner. In October 1980, after the Appeals Court affirmed the denial of the double jeopardy claims, the district court set the case for trial to commence on January 5, 1981.

Thereafter, on November 25, 1980, co-defendant Baszner moved to disqualify the United States Attorney's Office for the Western District of Tennessee from participating in the retrial of his case, claiming that that office was laboring under a conflict of interest due to Canale's having become an Assistant United States Attorney. The Petitioner, on December 15, joined the disqualification motion.

The Petitioner also moved, on December 18, 1980, to dismiss the superseding indictment, again citing the alleged conflict of interest.

The Petitioner filed an affidavit, dated December 18, 1980 which accompanied his motion to dismiss the indictment in which he detailed his relationship with his attorney, Phil M. Canale, Jr. The affidavit disclosed that Canale had been retained in the matter at bar in November, 1977; had tried the case to a mistrial in 1978; had been retained for the second trial; had been paid over $26,000.00. The Petitioner stated that Mr. Canale assisted in formulation and preparation of the interlocutory appeal to the Appeals Court on a double jeopardy issue.

It was at this point in the defense of the case that the Petitioner first learned that Canale would accept employment in the office of the prosecutor. The Petitioner pointed out the fact that Canale had been paid a substantial sum of money; that he had agreed to retry the case; and that it would be financial disaster if it were necessary to find new counsel.

The affidavit alleged that Canale had assured the Petitioner that he would not abandon the case; that he would be able to continue on

the case and that on several occasions he did give legal advice and had advised the Petitioner not to join with Baszner in his petition for certiorari to this Supreme Court from the ruling of the Appeals Court. Ultimately as the second trial approached, Canale acknowledged that he could not represent the Petitioner nevertheless his appearance in this case has not been formally withdrawn.

Following a December 18, 1980, hearing on the disqualification motion, the district court on December 24, "reluctantly" granted petitioners motion to disqualify the entire United States Attorney's Office for the Western District of Tennesse from participating in the defendant's retrial, so long as Canale remained a member of that Office. The Trial court expressed concern over the "appearance of impropriety". The court therefore granted peitioners motion.

The Government appealed to the United States Court of Appeals for the Sixth Circuit, under 28 U.S.C. §1291, the District Court Order granting the motion to disqualify the U.S. Attorney's Office in Memphis, Tennessee. The Court of Appeals held that the District Court Order was immediately appealable under 28 U.S.C. §1291, reversed the judgment of the

District Court and remanded the case for trial. A Petition for Rehearing En Banc was denied.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals did not have the jurisdiction to hear an appeal from a District Court Order granting Petitioner's motion to disqualify the United States Attorney's Office.

This case presents the question whether the Government may, in a criminal action, take an appeal, pursuant to 28 U.S.C. §1291 from a District Court Order disqualifying a United States Attorney's Office. In Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981), the Court held that an order refusing to disqualify an attorney in a civil action on conflict of interest grounds was not a final judgment and did not present an appealable issue under the collateral order exception. In light of uncertainty amongst the Circuits as to the effect of Firestone on the issue presented by this litigation, the Court should grant this Petition in order to resolve the question.

This Court has consistently interpreted §1291 as indicating that a party may not take an appeal until there has been "a decision by the

District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Coopers and Lybrand v. Livesay, 437 U.S. 463, 467 (1978), quoting Catlin v. United States, 324 U.S. 229, 233 (1945). In Firestone, supra at 368, the Court offered several reasons for this rule of finality which requires that a party ordinarily raise all claims of error in a single appeal. First, appellate courts owe deference to the trial judge "as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial . . . piecemeal appeals would undermine the independence of the district judge . . ." Id. at 374. Second, the rule is consistent with the policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. Id. at 374 quoting, Cobbledick v. United States, 309 U.S. 323, 325 (1940). Third, the rule promotes efficient judicial administration. Id. at 374, citing, Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 170 (1974). "The rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law'". United States v.

MacDonald, 435 US 850, 854, quoting, Cobbledick, supra, at 325.

In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1941) the Court "recognized . . . a narrow exception to the requirement that all appeals under §1291 await final judgment on the merits." Firestone, supra at 374. Although Cohen was a civil case its collateral order doctrine is equally applicable in both civil and criminal proceedings. Abney v. United States, 431 U.S. 651, 659 n.4. Cohen held that a "small class" of orders that did not end the main litigation were nevertheless final and appealable pursuant to §1291. It held that the Court of Appeals properly assumed jurisdiction of an appeal pursuant to §1291 because the District Court's Order fell into the class of decisions which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Cohen, supra at 546. The Court recently defined the limited class of final "collateral orders" as follows:

> [T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Coopers and Lybrand v. Livesay, supra at 468 (footnote omitted). See Abney, supra at 658.

All factors in the Cohen test must be satisfied in order to find a final "collateral order" See Firestone, supra at 368, Abney, supra at 651. Since the Government does not assert a claim or right "too important to be denied review", in fact there is no important issue to decide within the meaning of Cohen, the "collateral order" test is not fully satisfied and the Court of Appeals lacks jurisdiction to review the District Court Order.

The insistence of the United States Attorney for the Western District of Tennessee to prosecute amounts to perverseness and only impedes the Petititioner's speedy trial rights. The fact that one prosecutor is barred does not effect the case at all. The Department of Justice is routinely called upon to prosecute cases in the various districts. The Government's right or ability to prosecute is not

effected by the lack of jurisdiction. Prosecution by the Department of Justice rather than the United States Attorney for the Western District of Tennessee is a small price to pay where the counter balancing benefit to the Petitioner is that the appearance of fairness and propriety is preserved.

The Government does not give sufficient recognition to the fact that a federal criminal case is brought in the name of the United States and it is the Attorney General who has the general power to presecute the violation of the laws of the United States.

The Executive Branch--specifically, the Attorney General--has the power to conduct federal criminal litigation. 28 U.S.C. §516. It is "an executive function within the exclusive prerogative of the Attorney General." United States v. Cox, 342 F.2d 167, 190 (5th Cir.), cert. denied sub nom. Cox v. Hauberg, 381 U.S. 935, (1965).

The United States has chosen to combat crime through a strong centrally organized Department of Justice and not through independent local United States Attorneys offices United States v. DiGiordano, 393 F.Supp. 997

(W.D. Mo, W.D. 1975). Under the broad ambit of applicable statutes the Attorney General may appoint officials "to detect and prosecute crimes against the United States." 28 U.S.C. §533. He has supervision of all litigation in which the United States is a party and is commanded to "direct all United States Attorneys, assistant United States Attorneys, and special attorneys . . . in the discharge of their respective duties." 28 U.S.C. §519. He may appoint assistant United States Attorneys in any district in which they reside (28 U.S.C. §§542, 545) or "appoint special attorneys when the public interest so requires." 28 U.S.C. §§542, 543. He may direct any officer of the Department of Justice to conduct and argue any case in any court of the United States. 28 U.S.C. §518. See In re Subpoena of Persico, 522 F.2d, 41 (2d Cir. 1975).

Clearly the Attorney General has the authority to assign other officer of the Department of Justice to the trial of this defendant without either delay or hardship. The order of the district court presents the United States with an inconvenience, albeit slight, while it seeks to protect a fundamental right of this defendant.

In addition, the current state of uncertainty which warrants granting this Petition is reflected by the fact that the 6th Circuit has adopted a different rule in this litigation than it did in the matter of Investigative Grand Jury Proceeding on April 10, 1979 v. Wittenberg, 621 F.2d 813 (6th Cir. 1980). In Wittenberg the court held in a Per Curium opinion that where the Government had moved to dismiss the appeal and the appellant sought to invoke the "collateral order" doctrine that:

> The threshold issue is whether the Order currently is reviewable. Acknowledging the final judgment rule of 28 U.S.C. §1291, Wittenberg and the Gallon firm argue that the ruling falls within the exception of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 1225, 93 L. Ed. 1528 (1949), for determinations of collateral rights. They cite the decisions of several circuits that have reviewed disqualification orders. The government, based on this Court's opinion In re April 1977 Grand Jury Subpoenas, 584 F.2d 1366 (6th Cir. 1978), maintains that the disqualification order was an interlocutory rather than a final judgment and hence not appealable.

> For the reasons set out in In re April 1977 Grand Jury Subpoenas, supra, the witnesses may not seek review of disqualification orders on an interlocutory basis but only after contempt proceedings or conviction. Id. 814, 815.

If the perception of even handedness of the judicial system is to be retained, the Sixth Circuit can not give preference to the Government where it has so recently denied this precise right to others where the allowance of the Government's disqualifications motion was appealed.

Petitioner submits that the Appeals Court had no jurisdiction and the order of the District Court should control the case.

2. The ethical considerations which mandated disqualification of Assistant United States Attorney Canale from prosecuting this case also mandated disqualification of his entire Office, the United States Attorney's Office for the Western District of Tennessee.

The District Court Order Will Preserve the Appearance of fairness and Propriety Without Impairing the Government's Ability to Function.

The circuits are in conflict on the issue (1.) of whether disqualification of a Government Attorney from a prosecution warrants disqualification of his entire office, therefore the Court should grant the writ in order to resolve the dispute.

The district court order will preserve the appearance of fairness and propriety and will not unreasonably impair the Government's ability to

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[1]Although the 6th circuit in this case reversed a district court order granting a motion to disqualify, in State of Ark. v. Dean Food Products Co., Inc., 605 F.2d 380 (8th Cir. 1979), the 8th Cir. held that where ethical considerations mandated disqualification of an assistant attorney general the requirement of Canon 9 of the A.B.A. Code of Professional Responsibility that a lawyer avoid even the appearance of professional impropriety mandated that his staff members also be disqualified. Please note that in Re Multi-Piece Rim Products Liability v. Risjord, 612 F.2d 377 (8th Cir. 1980), Dean Foods was overruled to the extent it held the denial of a motion to disqualify counsel appealable under the collateral order doctrine.

function in as much as the Department of Justice can assume responsibility for prosecuting the case.

In reversing the district court order the court of appeals referred to the A.B.A. Committee on Professional Ethics Formal Opinion 342, 62 A.B.A. J. 517 (1976) which contained a discussion of the relationship between D.R. 9-101(B) (2.) and D.R. 5-105 (D) (3.) of the A.B.A. Code of Professional Responsibility. The court stated that:

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[2]D.R. 9-101 (B). A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

[3]D.R. 5-105 (D.) If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

> [w]hen the disciplinary rules of Canons 4 and 5 (4.) [footnote added] mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter . . . if DR 5-105(D) were so construed, the government's ability to function would be unreasonably impaired.

U.S.A. v. Caggiano, No. 81-5002, slip op. at 13 (6th Cir. September 17, 1981), Formal Opinion 342, supra at 521.

The district court order will not render a governmental department incapable of handling this prosecution. As stated earlier the Department of Justice is routinely called upon to prosecute cases in the various districts. A Federal criminal case is brought in the name of the United States and it is the Attorney General who

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[4]Canon 5. A lawyer should preserve the confidences and secrets of a client.

Canon 6. A lawyer should exercise independent professional judgment on behalf of a client.

has the general power to prosecute the violation of the laws of the United States. Clearly the Attorney General has authority to assign other officers of the Department of Justice to the trial of this defendant without delay or hardship. Prosecution by the Department of Justice rather than the United States Attorney for the Western District of Tennessee is a small price to pay where the counterbalancing benefit to the Petitioner is that the appearance of fairness and propriety is preserved.

3(a). The District Court acted within its discretion when it disqualified the entire United States Attorney's Office for the Western District of Tennessee.

The district court disqualification order was well within the proper scope of its discretion and should not have been reversed. The district court has the responsibility for the supervision of the members of its bar; the scope of review in disqualification cases is that the district court's finding will only be upset upon showing an abuse of discretion, Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975); See In Re Gopman, 531 F.2d 262, 266 (5th Cir. 1976); Kroungold v. Triester, 521 F.2d 763, 765 (3rd Cir. 1975). A judge "abuses his discretion"

only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he could have rationally based that decision. Premium Service Corp. v. Sperry and Hutchinson Co., 511 F.2d 225 (9th Cir. 1975).

The trial judge allowed defendant's motion to disqualify the office of the United States Attorney for the Western District of Tennessee holding:

> The appearance of impropriety, however, is a matter of concern to this Court as it has been to others considering this difficult question. Having a substantial doubt, then, and wishing to avoid a lengthy trial that could be determined on appeal to be a tainted one, the Court with considerable reluctance grants the Caggiano motion that the United States Attorney's Office staff for the Western District of Tennessee be disqualified from proceeding to prosecute him so long as Mr. Canale remains a member of the United States Attorney's Office.

It is a fundamental right and duty of the trial judge, and indeed the judiciary generally,

to supervise attorneys who appear before them. This is a basic principal of judicial administration which recognizes no special exception for attorneys for the government in criminal cases. In Black v. State of Missouri, 492 F.Supp. 848 (W.D. Mo. W.D. (1980) the Court held:

> A fundamental responsibility of any trial court is the supervision of the attorneys who appear and practice before it. See Cohen v. Hurley, 366 U.S. 117, 123-4, 81 S. Ct. 954, 958-959, 6 L. Ed.2d 156, 162 (1961); Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir. 1978); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385 (3d Cir. 1972), cert. denied, 411 U.S. 986, 93 S. Ct. 2271, 36 L. Ed.2d 964 (1973). "In supervising all of its officers, the Court has a responsibility to maintain public confidence in the legal profession and accordingly, may disqualify an attorney not only for actual improper conduct but also for failing to avoid even the appearance of impropriety." Price v. Admiral Ins. Co., 481 F.Supp. 374, 377 (E.D. Pa. 1979) (emphasis in original); see Richardson v. Hamilton Int'l Corp., 469 F.2d 1385-86. Thus, if it appears that a breach of pro-

> fessinal ethics has been committed by an officer of the Court, the Court must carefully scrutinize all relevant circumstances; determine if a breach has in fact occurred; and select an appropriate remedy, which might include disqualification of counsel. 492 F.Supp. at 859, 860.

In United States v. Miller, 624 F.2d 1198 (3rd Cir. 1980) a case not unlike this case, the Court of Appeals upheld disqualification of an entire office where an attorney in the office had represented the adverse party. The criminal defendant's law firm was disqualified because one of its partners had been an Assistant United States Attorney in the prosecutor's office while the case against the defendant was being prepared. The Court of Appeals noted that the District Court's power to disqualify an attorney derives from its inherent authority to supervise the professional conduct of attorneys appearing before it, Id. at 1201. It also stated that exercise of that authority is committed to the sound discretion of the court and will only be overturned on appeal due to an abuse of discretion, Id. at 1201. Thus, the defendant in Miller was deprived of defense counsel of his own choice.

The trial judge clearly based his ruling on the exercise of his judicial discretion and his inherent authority to supervise the professional conduct of attorneys appearing before him and on the grounds that the facts of this case offended the appearance of justice and not upon the legal effects of the A.B.A. rules. The question, if reached by this Court, is on the scope of judicial discretion of a trial judge.

Under the facts of this case the trial judge's order of disqualification was well within the proper scope of his discretion and should not have been reversed.

b. As a Matter of Law The District Court Was Correct In Its Disqualification Of Mr. Canale And His Office.

An attorney may be disqualified if he has accepted employment "adverse to the interest of a former client on a matter substantially related to the prior litigation" without the court inquiring "whether the attorney in fact received confidential information, because the receipt of such information will be presumed." Allegaert v. Perat, 565 F.2d 246, 250 (2d Cir. 1977), see accord, Schlietter v. Railoc, 546 F.2d 706, 710 (7th Cir. 1976). In Schloetter, attorney

Jeffery, while a member of the Donnelly firm, represented the plaintiff in prosecuting his original patent application. The Donnelly firm was later retained to represent the defendant in an infringement action involving the same patent. The trial court compelled the firm to withdraw as counsel even though Jeffery was no longer a member of the Donnelly firm. The Court of Appeals held that if Jeffery were still a member of the Donnelly firm, the confidential information he presumptively possessed would be imputed to other members of the firm regardless of whether or not they had actually been exposed to such confidences. Id. at 710. The court held that even if defendant's attorneys were not actually exposed to confidential information disclosed while Jeffery represented Schloetter, the District Court was within the bounds of its discretion in disqualifying the firm because of the appearance of impropriety. Id. at 711.

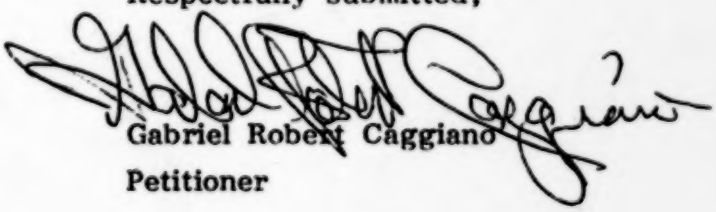
As with Mr. Jeffery in Schloetter, Mr. Canale in this case would be disqualified were he to be assigned to the prosecution of this defendant because the subject matter of his former representation of the defendant is the same as the subject matter of this prosecution. It is, therefore, clearly the responsibility of the trial judge to issue the order barring Mr.

Canale's office from further prosecution of the defendant. This position is correct whether or not there had been any actual breech by Mr. Canale of his client's confidences because as the trial judge ruled any different result would offend the appearance of propriety.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,



Gabriel Robert Caggiano
Petitioner

Appendix A.

Nos. 81-5002, 81-5021, 81-5022, 81-5182

United States Court of Appeals
For the Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. GABRIEL ROBERT CAGGIANO, *Defendant-Appellee* (81-5002), UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RAYMOND BASZNER (81-5021), NIGEL WINFIELD (81-5022), *Defendants-Appellants.* RAYMOND BASZNER, *Petitioner,* v. UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION, AT MEMPHIS, (81-5182), *Respondent.*	APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed September 17, 1981.

Before WEICK and KEITH, Circuit Judges, and PORTER, U.S. District Judge.*

WEICK, Circuit Judge. The Government has appealed to this court under 28 U.S.C. § 1291 from an order of the district court granting the motion of the defendant Gabriel Robert Caggiano, filed in a 1977 criminal case to disqualify the entire United States Attorney's Office in Memphis, Tennessee, consisting of many lawyers because of an alleged appearance of a conflict of interest of only one of the Assistant United States Attorneys in said office. Defendants Baszner and Winfield have appealed to this court from an order of the district court denying their motion to disqualify the entire United States Attorney's Office in Memphis, Tennessee, because of an alleged conflict of interest of one of the assistants employed in the office and said defendants have also filed a petition in this court for a writ of mandamus to compel the district court to grant their motion to disqualify. By order of this court, all of the appeals which were timely filed, and the mandamus proceeding, were consolidated for argument and have been briefed and orally argued.

This is the second appeal in this unduly prolonged case which was first tried to a jury that was unable to agree upon a verdict and the court declared a mistrial. The defendants then filed a motion to dismiss the indictment claiming double jeopardy which motion was denied by the court. On appeal, we affirmed by order. *United States* v. *Caggiano*, Case Nos. 79-5281, 79-5282 (6th Cir. June 13, 1980).

Appellee Caggiano, joined by Baszner and Winfield, contends that we have no jurisdiction to hear the government's appeal asserting that no final appealable order had been entered. Baszner and Winfield contend that the order deny-

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* Honorable David S. Porter, Senior District Judge for the Southern District of Ohio, sitting by designation.

ing their motion to disqualify is a final appealable order and in any event, we have jurisdiction in mandamus. In other words, while Baszner and Winfield are claiming that an order granting a motion to disqualify is not a final order as to the government, they assert that an order denying a motion to disqualify is final as to them.

For the foregoing reasons and those which follow, we hold that the order granting the motion to disqualify is final as to the government and it has the right to appeal under § 1291 and that we have no jurisdiction to hear the appeals of the defendants, other than Caggiano.

We are of the opinion that the district court erred in disqualifying the entire office of the United States Attorney and we therefore reverse.

I.

On October 13, 1977, a federal grand jury sitting in the Western District of Tennessee, returned a multicount indictment charging Gabriel Caggiano, an attorney at law, (appellee in Case No. 81-5002), Raymond Baszner (appellant in Case No. 81-5021 and petitioner in Case No. 81-5182), and four other co-defendants with mail and wire fraud, interstate transportation of stolen and fraudulently obtained property, and conspiracy to commit these offenses. The indictment arose out of a complex series of transactions, the object of which was allegedly to defraud Elvis Presley out of a jet airplane or airplanes.

Following a number of pretrial motions filed by the defendants, the trial of Caggiano, Baszner, and a co-defendant commenced on August 21, 1978.[1] The case went to the jury on

[1] Prior to trial, two co-defendants — Phillip Kitzer, Jr., and Frederick Pro — entered pleas of guilty. Trial of the remaining co-defendant, J. Lawrence Wolfson, had been severed.

September 7, 1978, and on September 11, the jury announced that it had found Baszner not guilty on three counts but was hopelessly deadlocked on the remaining counts, as it also was on all counts relating to Caggiano. The co-defendant was found guilty on three counts and not guilty on all other counts. Upon request of Caggiano and Baszner, the district court declared a mistrial.

In November of 1978, a grand jury returned a superseding indictment which named, *inter alia*, Caggiano, Baszner, and Nigel Winfield (appellant in Case No. 81-5022) as defendants. Within the next nine months, defendants either individually or collectively filed a myriad of motions, including motions by Caggiano and Baszner to dismiss the indictment premised on a claim that retrial would place them twice in jeopardy for the same offense.[2] The latter motions were overruled, and an interlocutory appeal followed to this court with the result as before stated. They all operated to delay the criminal case which in 1981 is not yet ready for the second trial.

In May of 1980, while the appeals were pending, Mr. Phil Canale, Jr., Esq., accepted a position as an Assistant United States Attorney for the Western District of Tennessee. Mr. Canale, along with Mr. Edward Kizer, Esq., had represented Caggiano during the first trial and during the preliminary stages of his defense to the second indictment, though the extent to which Canale assisted in Caggiano's defense following the mistrial is not altogether clear and is the subject of some dispute.

By order of June 13, 1980, this court affirmed the district court's rulings on the motions to dismiss the indictments.[3]

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[2] Docket sheets from the district court indicate that no fewer than 32 defense motions were filed during this period, exclusive of any motions filed by co-defendant J. Lawrence Wolfson.

[3] *United States* v. *Caggiano*, Case Nos. 79-5281, 5282 (6th Cir.), *cert. denied sub nom., United States* v. *Baszner*, __ U.S. __, 101 S. Ct. 226 (1980).

Shortly after receipt of the court's mandate, the district court, on October 15, 1980, scheduled trial of the case for January 5, 1981. On November 25, 1980, Baszner moved to disqualify the entire United States Attorney's Office for the District because of an alleged conflict of interest of one of its many attorneys. Caggiano joined in Baszner's motion on December 15, filing in addition a motion to dismiss for want of a Speedy Trial. Three days later, Winfield too moved to disqualify the United States Attorney's Office.

A hearing was held on the motions at which the district court considered the affidavits submitted by each of the defendants in support of their motions as well as affidavits submitted by the government in response. The hearing provided an opportunity for Caggiano and the other appellants, Baszner and Winfield, to offer evidence, but they offered only the affidavits. These affidavits provide in essence as follows:

Caggiano — In affidavit filed December 18, 1980, Caggiano states that he retained Canale in November of 1977. Canale had acted as lead counsel during the initial trial and had assisted in formulation and preparation of the interlocutory appeal to this court on the double jeopardy issue. He states that as of August 20, 1979, he had paid Canale in excess of $25,000.

On March 18, 1980, while his interlocutory appeal was pending before this court, Caggiano states that he first learned of the possibility that Canale would accept employment in the United States Attorney's Office. He asserts that he had been assured Canale would continue to represent him regardless of any appointment to the United States Attorney's Office. By letter of May 14, 1980, Caggiano learned that the possibility had come to pass, that Canale had received an appointment and would be sworn in on May 16, 1980. In that letter, Canale informed Caggiano that Mr.

Kizer would handle oral argument on the appeal, scheduled for June 4, 1980.[4] Nonetheless, it is alleged that Canale suggested that he might still be able to represent Caggiano in other aspects of the case.

Canale, according to Caggiano's affidavit, accepted a $500 check on May 20, 1980, as payment for his services and expenses relative to the appeal. Further, on July 9, 1980, Caggiano sought, and was given, Canale's advice as to whether he should petition the Supreme Court for a writ of certiorari. It was not until October 28, 1980, that Canale told Caggiano during a telephone conversation that he no longer could represent him.

Baszner — Baszner filed a single affidavit in support of his motion. In that affidavit, Baszner alleges that he and his attorney, Mr. Vincent Flynn, Esq., had met Mr. Canale and Mr. Kizer several times before and during the initial trial. As a result of those meetings, Canale had become privy to confidential information and strategy relating to his defense.[5] Further, Baszner alleges, Canale had represented him during the final stages of the initial trial. Specifically, Canale on behalf of Caggiano and Baszner, had joined in a motion for a mistrial and renewed an earlier motion for a judgment of acquittal when Baszner's attorney was absent during jury deliberations on September 8 and 11, 1978.

Winfield — Winfield's motion was supported by the affidavit of his attorney, Mr. Robert F. Collins. Mr. Collins, according to his affidavt, met Canale at various times in the months prior to Canale's appointment and "[d]uring these

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[4] As earlier indicated Mr. Kizer had participated in Caggiano's defense during the first trial. Until Canale's appointment to the United States Attorney's Office, Canale and Kizer were members of the law firm of Canale, Walsh, Kizer & Gaerig.

[5] Both Baszner and Winfield have refused to disclose either to the district court or this court the nature of the alleged confidential information or elements of defense strategy revealed to Canale.

meetings, various defense tactics and strategy were discussed, evidence was considered and discussed and exchanged between us as counsel for the co-defendants in this cause, and ... [Canale] has material knowledge relative to the defense of [Winfield]."

The government — The government responded to the defendants' supporting affidavits with six affidavits of its own: two by Mr. Michael Cody, United States Attorney for the Western District of Tennessee; two by Mr. Joe Dycus, an Assistant United States Attorney who had represented the government during the first trial and who had been assigned to the prosecution of the defendant on the superseding indictment; and two by Canale.

In his affidavits, Mr. Cody states that he did not "solicit" Canale; rather, Canale approached him. Canale was hired because of his "excellent reputation as an attorney of unquestioned integrity and because of his maturity." (Canale had served as District Attorney General for Shelby County, Tennessee, from 1955 to 1974).

Cody denies every having talked with Canale about the instant case other than to specifically inform him that he would not be allowed to further represent Caggiano. Cody further alleges that

> [S]ince Mr. Canale became an Assistant United States Attorney, it has been a policy of this office that Mr. Canale and Mr. Dycus [the only attorney in the office working on the case] would not discuss this case and that Mr. Canale would be exposed to nothing concerning this case. To the best of my knowledge, information and belief since Mr. Canale became an Assistant United States Attorney: (1) neither Mr. Dycus, nor Mr. Canale has discussed this case with each other; (2) no other attorney or any other person employed by this office or the Department of Justice has discussed this case with Canale; and (3) Mr. Canale has not been privy to or ex-

posed to any information in this office or the Department of Justice concerning this case. This office and the Department of Justice will continue to make sure that Mr. Canale is not exposed to any information concerning this case and that he does not discuss the case with anyone in this office or the Department of Justice.

Mr. Joe Dycus, in his two affidavits, states that he had been assigned to the case since September of 1977. He presented the matter to both grand juries, handled all pretrial work before the first trial, represented the government during the first trial, and prepared the case for trial on the "two or three occasions" when it had been set after the first trial. He has interviewed and is "conversant" with every witness for the government. Dycus further states that he is "intimately familiar" with the facts and documents in this case, including the transcript of the first trial of over seventeen volumes.

As a result of his knowledge of the case, Dycus states, it is doubtful that Canale could reveal anything to him that he does not already know. In any event, it was agreed when Canale joined the Office that Canale would not be allowed to talk to anyone in the Office about the case. Since that time, Dycus has not discussed the case with Canale, and, to the best of his knowledge, no one else in the Office or in the Department of Justice has discussed the case with Canale. Dycus pledges to never discuss the case with Canale or to provide Canale access to any of the files and records of the case. He further states that he "thoroughly and honestly" believes Canale will not attempt to discuss the case with anyone.

Canale, in his affidavits, states that he applied for the position of Assistant United States Attorney, that he was not solicited or "sought out" by Cody. He swears also that, since his appointment, he has not talked about the case with anyone in the United States Attorney's Office. Further, Canale advised Caggiano upon his appointment that he could

no longer represent him. He also advised Kizer, Canale's former law partner, and Caggiano's co-counsel during the initial trial,[6] to also convey to Caggiano the fact that Canale could not represent him any longer. Canale admits, however, that after his appointment Caggiano twice called him long distance to discuss the case, and during those conversations, he answered Caggiano's questions "out of a feeling of professional and personal courtesy."

After considering the affidavits and arguments of the parties, the district court determined that no defendant had made any "showing of any actual prejudice to [him] by any revelation, direct or indirect, intended or unintentional, of information by Canale bearing upon their defenses, their strategies or their confidences." The court also was persuaded that Canale, "an experienced attorney of high repute," and Cody each "acted in good faith and that no breach of confidences as to any defendant has occurred." These findings, in our opinion, are supported by substantial evidence and are not clearly erroneous. Nonetheless, the court expressed "concern" over the "appearance of impropriety." Based on that concern, and the desire "to avoid a lengthy trial that could be determined on appeal to be a tainted one," the court granted Caggiano's motion with "considerable reluctance." The district court denied Baszner's and Winfield's motions, however, since neither had enjoyed a genuine attorney-client relationship with Canale and since neither had shown any prejudice.

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[6] Kizer was Caggiano's counsel of record when the motion to disqualify was filed. He has since been granted leave to withdraw.

II.

The Order Disqualifying The Entire Office Of The United States Attorney For Mere Appearance Of Conflict Of Interest Of One Of Its Many Attorneys Is Immediately Appealable Under 28 U.S.C. § 1291.

The weight of authority is that in civil cases an order granting a motion to disqualify is immediately appealable as a final order under § 1291 while an order denying a motion to disqualify is not appealable under § 1291. *General Electric Co.* v. *Valeron Corp.*, 608 F. 2d 265 (6th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980), and *Armstrong* v. *McAlpin*, 625 F. 2d 433, 440-441 (2nd Cir. 1980) (en banc) *vacated on other grounds*, ___ U.S. ___, 101 S. Ct. 911 (1981), holds that orders granting disqualification are appealable and *Firestone Tire & Rubber Co.* v. *Risjold*, 101 S. Ct. 669 (1981), holds that orders denying such motions are not appealable under § 1291. See cases collected in United States Code Service 28 U.S.C. § 1291, Note 72, entitled Disqualification of Counsel and Note 72 in its May 1981 Cumulative Supplement.

As to orders in criminal cases, in *Carroll* v. *United States*, 354 U.S. 394, 403 (1957), the Supreme Court stated:

> It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U.S.C § 1291 without regard to the limitations of 18 U.S.C. § 3731 . . .

In *United States* v. *Calandra*, 455 F. 2d 750 (6th Cir. 1972), we held that an order entered in an independent plenary proceeding is appealable by the government under § 1291. We relied on *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793 (1949), and *Cogen* v. *United States*, 278 U.S. 221 (1929).

In *United States* v. *United States District Court, Etc.*, 645 F. 2d 7 (6th Cir. 1981), we held that the government could appeal under § 1291 from an order of the district court granting defendant's motion to reduce his sentence in a criminal case.

It is obvious that 18 U.S.C. § 3731 providing for appeals from certain orders and decisions by the government in criminal cases has no application to the present case. There is nothing in this statute or in its legislative history which inhibits appeals under § 1291 where applicable and as held by decisions hereinafter set forth.

In *United States* v. *Cowan*, 524 F. 2d 504 (5th Cir. 1975), *cert. denied, sub nom., Woodruff* v. *United States*, 425 U.S. 971 (1976), the government, in an opinion written by Judge Murrah, was permitted to appeal under § 1291 from an order of the district court denying the motion of the United States Attorney under Rule 48(a) to dismiss criminal proceedings and appointing private special prosecutors to continue prosecuting the case. In reviewing the merits, the court held that the district court had abused its discretion in entering the order denying the government's motion and in appointing a private special prosecutor to replace the United States Attorney.

The decision of the Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is applicable here. It was recently applied by the Supreme Court in *Firestone Tire & Rubber Co.* v. *Risjord, supra*, 101 S. Ct. 669 (1981). Justice Marshall, who wrote the opinion for a unanimous court, stated *inter alia*:

> Our decisions have recognized, however, a narrow exception to the requirement that all appeals under § 1291 await final judgment on the merits. In *Cohen* v. *Beneficial Industrial Loan Corp., supra*, we held that a "small class" of orders that did not end the main litigation were nevertheless final and appealable pursuant to § 1291.

Cohen was a shareholder's derivative action in which the Federal District Court refused to apply a state statute requiring a plaintiff in such a suit to post security for costs. The defendant appealed the ruling without awaiting final judgment on the merits, and the Court of Appeals ordered the trial court to require that costs be posted. We held that the Court of Appeals properly assumed jurisdiction of the appeal pursuant to § 1291 because the District Court's order constituted a final determination of a claim "separable from, and collateral to," the merits of the main proceeding, because it was "too important to be denied review," and because it was "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*, at 546. *Cohen* did not establish new law; rather, it continued a tradition of giving § 1291 a "practical rather than a technical construction." *Ibid.* See, *e.g.*, *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 413-414 (1926); *Bronson* v. *LaCrosse & Milwaukee Railroad Co.*, 2 Black 524, 530-531 (1863); *Forgay* v. *Conrad*, 6 How. 201, 203 (1848); *Whiting* v. *Bank of the United States*, 13 Pet. 6, 15 (1839). We have recently defined this limited class of final "collateral orders" in these terms: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, *supra*, at 468 (footnote omitted). See *Abney* v. *United States*, 431 U.S. 651, 658 (1977).

The order of the district court disqualifying the entire Office of the United States Attorney was a final determination of the claim. The United States Attorney's Office, whose duty it was to prosecute criminal actions in the district, was finally precluded from performing its statutory obligations. The claim was "separable from, and collateral to" the merits

of the main proceeding and was "too important to be denied review" and was "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Unlike a private attorney, the United States Attorney's Office ought not to be required to disobey the order of the court and subject itself to contempt charges in order to obtain appellate review of the district court's order. Such conduct would only have engendered public disrespect of the United States Attorney's Office which it ought never to be required by law to endure. It is the sworn duty of law enforcement agencies to obey the law. For them to disobey the law will never be tolerated.

We now reach the merits of the case. In disqualifying the entire United States Attorney's Office, the district court in its ruling impliedly relied on Disciplinary Rule 5-105(D) of the ABA Code of Professional Responsibility as that Rule was relied on in the defendant's motions to disqualify. There is, of course, quite a difference in the relationship between law partners and associates in private law firms and lawyers representing the government. The ABA Committee on Professional Ethics recognized there are substantial reasons against treating the government as a private enterprise in its Formal Opinion 342, 62 A.B.A.J. 517 (1976). The Committee discussed the situation similar to this case where a lawyer leaves a private practice for government service. The Committee ruled that other government lawyers in the office are not disqualified from handling matters in which their new associate was involved in his former practice. The Committee stated:

> When the disciplinary rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered inca-

> pable of handling even the specific matter. Clearly, if DR 5-105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates the government action not be hampered by such a construction of DR 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. The important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101(B), or similar disciplinary rules.

The Committee concluded that when the individual attorney is separated from any participation on matters affecting his former client, "vicarious disqualification of a government department is not necessary or wise."

Obviously, this Opinion of the ABA Committee was never called to the attention of the district judge as he did not discuss it.

Even prior to the ABA Opinion 342, it was recognized that disqualification of an entire government department, because of a conflict of interest of a government attorney arising from his former employment, would not be appropriate. *United States* v. *Standard Oil Company*, 136 F. Supp. 345, 363 n. 34 (S.D.N.Y. 1955, Judge Kaufman) (dictum).

As before stated, no prejudice has resulted to anyone in this case and it is time that the long delays from the various maneuvers be brought to a halt and that the case be tried on its merits.

We have no jurisdiction over the appeal of defendants-appellants Baszner and Winfield as the order denying their motion to disqualify from which they appeal is not a final appealable order as to them under 28 U.S.C. § 1291. *In re Grand Jury Subpoenas*, 594 F. 2d 1366 (6th Cir. 1978), *cert. denied*, 440 U.S. 934 (1979).[7] This is also an inappropriate case for the issuance of a writ of mandamus and the petition is hereby dismissed.

The judgment of the district court is reversed and the case is remanded for trial.

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[7] In *Firestone Tire & Rubber Co.* v. *Risjord*, __ U.S. __, 101 S. Ct. 669 (1981), the Supreme Court held that the denial of a motion to disqualify in a civil case was not appealable under § 1291 prior to final judgment in the underlying litigation. The Court, however, not having been presented with the issue, expressed no opinion on the question of whether an order denying a motion to disqualify in a criminal case would be appealable under § 1291. 101 S.Ct. at 672, n. 8.

We discern no reason why the result should be different in a criminal proceeding. The requirements of § 1291 are to be applied in the same manner and, if anything, the policy of avoiding piecemeal and unduly protracted litigation weighs more heavily in a criminal proceeding than it does in a civil action.

Appendix B.

IN THE

United States District Court
For the Western District of Tennessee Western Division

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	NO. 77-20201
	)	
	)	
G. ROBERT CAGGIANO, et al.	)	

O R D E R

This case involves further and continued problems and difficulties with respect to proceeding to a trial and a further trial of defendants, alleged co-conspirators and involved in a fraud pertaining to an airplane or airplanes owned by the late Elvis Presley. It is now scheduled to be tried again on January 5, 1981. Within a month of trial, counsel for defendants have now raised the question — should all the persons in the Office of the United States Attorney for the Western District of Tennessee, be disqualified from trying the case because of Phil M. Canale, Jr., formerly lead counsel for Caggiano, one of four co-defendants and an alleged co-conspirator, at the first trial, is now associated with the said United States Attorney's Office?

This document entered on docket sheet in compliance with Rule 55 and/or 32(b) FRCrP on 12/24/80.

The question is not easily resolved and has but few close precedents this Court has been able to discern. The Court has conducted a hearing on the motion to disqualify and has now considered the affidavits and the memoranda adduced by the defendants and by the United States.

Mr. Canale, previously for many years the Shelby County Attorney General in charge of prosecution of state criminal charges in this most populous County of Tennessee, represented defendant Caggiano in a four week jury fraud trial in 1978, resulting in conviction of one defendant, acquittal on some counts for some defendants, and a mistrial because the jury could not agree as to several counts on the remaining defendants, including Mr. Caggiano who happens to be a practicing attorney from the Boston, Massachusetts area. Already delay has occurred in a re-trial following that first trial because of double jeopardy issues now resolved after appeal. A new defendant has been added on a superseding indictment. All are charged as co-conspirators, and all now seek disqualification, because they say common strategy and confidences were discussed with Mr. Canale before and during the first trial, and subsequent to the first trial after the November, 1978 superseding indictment was issued involving Winfield for the first time as an indicted defendant.

Exactly what particular confidential information was revealed to Canale and the precise prejudice involved has not been detailed, but defendants claim they should not be put to the "Hobson's choice" of revealing those matters even to the Court to the detriment of their respective interests. Winfield's lawyer, for instance, claims by affidavit that Canale "has material knowledge relative to the defense of this co-defendant." Baszner claims defense strategies were discussed by his counsel and Canale, and points out that the latter represented his interests for a day or two while the jury was deliberating, and, finally, when it indicated it could not

reach a decision on all counts as to all defendants, in the discussion about declaring a mistrial.

From what has been submitted and the opportunity to be heard on this motion, the Court is satisfied that there has been no showing by defendants of any actual prejudice to them by any revelation, direct or indirect, intended or unintentional, of information by Canale bearing upon their defenses, their strategies or their confidences. As to all defendants, except Winfield, the record itself bears out what their sworn testimony has been about the case and what their trial strategy has been. That information is now a public record. Of course, special concern would exist as to Caggiano about whether any attorney-client confidence might somehow, even by sheer inadvertence, come to the attention of the prosecutor in this case, Assistant United States Attorney Dycus.

Several state cases have dealt with this precise problem and they have come to opposite conclusions. In *State* v. *Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972), the Supreme Court of Arizona (*en banc*) considered two questions:

> "(1) Where a Deputy Public Defender, who acted as co-counsel for the defendant, received confidential communications from the defendant and had access to all records and information pertaining to the defense, subsequently becomes Chief Deputy County Attorney for Maricopa County, should the Maricopa County Attorney's Office be precluded from prosecuting that individual?"
>
> "(2) If the Maricopa County Attorney's Office is precluded from prosecuting the defendant, should an independent authority be denied access to any evidence obtained by the County Attorney's Office?"

The attorney there involved with the potential of conflict of interest was "more than a mere assistant — he is the County Attorney's Chief Deputy, and as such, he has supervisory

powers and duties over the Assistant County Attorney who is prosecuting.' 502 P.2d 1342.

The Arizona court determined that the answers to these questions should be "yes" to avoid any appearance of impropriety, and the court noted it was not resting its decision on the particular internal position of the chief deputy involved. That same year the Alabama Court of Criminal Appeals came to a different conclusion that the entire district attorney's staff should not be disqualified merely because the district attorney had interviewed the defendant while he had been with the public defender's office. The court observed that there was no evidence the district attorney had discussed the matter with his staff member prosecuting the case. *Hannon* v. *State*, 48 Ala.App. 613, 266 S.2d 825 (1972).

New Mexico next had a similar problem to handle — an assistant district attorney handled the defense in a drug case of a defendant and the case ended in a mistrial. Before the second trial, the appointment as prosecutor took place (as in the instant situation). Taking note of Louisiana cases,[1] and *Hannon* v. *State, supra*, the New Mexico Court of Appeals declined to follow their reasoning and opted for the rationale of *State* v. *Latigue, supra*, holding that the entire staff of the District Attorney's Office should be precluded from engaging in the second trial. *State* v. *Chambers*, 86 N.Mex. 383, 524 P.2d 909 (1974). As observed by the New Mexico Court, a different result would have obtained in Louisiana. A similar set of circumstances there occurred — an assistant district attorney joined the prosecution staff after representing one of many defendants at the first trial in which a conviction on participation in a riot resulted but was subsequently on appeal set aside. In addition, other members of the District At-

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[1] *State* v. *Brazile*, 231 La. 90, 90 S.2d 789 (1952); *State* v. *Brown*, 274 S.2d 381 (La. 1973).

torney's staff had worked for the public defender's office while it was handling the defendants' case. There was, as here, no proof that any confidential matter was passed to those actually handling the prosecution. The overruling of a motion to recuse the entire staff was affirmed by the Louisiana Supreme Court in *State* v. *Bell*, 346 S.2d 1090 (La. 1977), *citing* the authority noted in footnote 1 and *Hannon, supra*. A Tennessee court cited the latter authority with approval in holding that the action of a state trial judge had been correct in overruling defendants' motion for dismissal and for recusal of the district attorney's office under circumstances where it appeared that a young staff assistant may have once interviewed[2] the two defendants while serving at the University of Tennessee legal clinic on charges which may or may not have been the same robbery charges as were involved in the particular case resulting in their convention. While this particular assistant participated in a minor way preliminary in the prosecution before the trial, the Tennessee Court of Criminal Appeals upheld the action of the trial judge in disqualifying only the staff assistant himself from any further part in handling the case, but also refusing to disqualify the entire district attorney general's staff. *Mattress* v. *State*, 564 S.W.2d 678 (1977). It was noted, however, that there was "no claim that any one of them ever represented appellants or had any confidential information." 564 S.W.2d 680. *See also Young* v. *State*, 177 S.2d 345 (Fla.Ct.App. 1965).

Fox v. *Shapiro*, 375 N.Y.S.2d 945, 84 Misc.2d 223 (1975) also holds that an entire prosecutor staff need not be disqualified with the district attorney himself who had headed the legal aid office which had represented a defendant in the

[2] The assistant had no recollection of the interviews, nor of receiving or giving out any confidential information about the case on trial.

matter later prosecuted by his office. This was so where precautions similar to those taken in the United States Attorney's office with Canale were followed to isolate the district attorney with respect to prosecution of a case in which he himself was presumptively disqualified. The court noted speedy trial concerns in that case which also concerns this Court in this particular matter before us.

A federal court has also addressed something like the problem to be addressed in this case in *Martin* v. *United Sttaes*, 335 U.S. 945 (9th Cir. 1964). An Assistant United States Attorney in that case had prosecuted a mail fraud charge in which the defendant and other co-conspirators were involved, and it turned out that the prosecutor had previously "appeared as attorney for one of the co-conspirators." When this development came to light, the United States joined defendant appellant's motion for summary reversal, and the United States Attorney's office in Nevada proceeded to prosecute the defendant a second time; another conviction ensued. In the first trial the particular defendant for whom the Assistant United States Attorney (before his appointment, of course) had acted was severed from the others, and after that trial, the Assistant United States Attorney had severed his connection with the United States. The co-defendants moved for dismissal and/or for a new trial because of the "taint" of the breach of the attorney-client relationship.

With very little discussion except to indicate that appellant co-conspirators were not deprived of a fair trial and that their claims involved hypothesis and conjecture, the *Martin* court overruled their contention. Apparently no motion was ever made to recuse the entire United Staets Attorney's office and neither the federal trial or appellate courts on their own motions felt this was necessary. The convictions were affirmed. *See also State* v. *Minor*, 258 A.2d 815 (Vt. 1969).

In civil cases there is a growing and substantial body of law dealing with disqualification of counsel. Circumstances, of course, are different in civil cases because normally there is an abundance of other counsel available to be of assistance to the party whose choice of attorney has been set aside by reason of disqualification involving some conflict of interest or apparent such conflict. In this criminal case, to the contrary, granting of defendants' motion will work a serious hardship in going forward expeditiously with this trial in an already old case. It will be a tedious and time-consuming process for another attorney to be chosen to prosecute this involved and complicated set of charges. The rule has been expressed and reiterated in civil matters in this Circuit where a conflict is asserted by a former client:

> It has been repeatedly held that an attorney may not represent a client in litigation against a former client if the subject matter of the litigation is "substantially related" to work he or she did for the former client. *See e.g. Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 565 (2d Cir. 1968); *Wilson P. Abraham Construction Corp.* v. *Armco Steel Corp.*, 559 F.2d 250, 252 (5th Cir. 1977); *T.C. & Theatre Corp.* v. *Warner Bros. Pictures*, 113 F.Supp. 265, 268 (S.D.N.Y. 1953).

Melamed v. *ITT Continental Baking Co.*, 592 F.2d 290, 292 (6th Cir. 1979). *See also General Electric Co.* v. *Valeron Corp.*, 608 F.2d 265 (6th Cir. 1979). Here there is a substantial relation between the representation of Mr. Canale of defendant Caggiano in this first trial and the office with which he is now associated prosecuting that defendant and others on the same charges against which Canale defended at trial and in brief on appeal. In civil cases, the entire firm has been disqualified where conflict of interest and substantial relation has been found as to a lawyer member of the firm despite efforts to insulate or isolate him as to any confidential informa-

tion that may or might have been obtained in prior representation. If the civil-criminal analogy is proper, the courts have been inclined to resolve the doubt in favor of disqualification even when no specific showing of actual prejudice has been established. *See Novo Terapeutisk* v. *Baxter Travenol*, 607 F.2d 186 (7th Cir. 1979).

Defendants in this case have not shown actual prejudice, nor that any breach of confidence has actually occurred. The appearance of impropriety, however, is matter of concern to this Court as it has been to others considering this difficult question. Having a substantial doubt, then, and wishing to avoid a lengthy trial that could be determined on appeal to be a tainted one, the Court with considerable reluctance grants the Caggiano motion that the United States Attorney's Office staff for the Western District of Tennessee be disqualified from proceeding to prosecute him so long as Mr. Canale remains a member of the United States Attorney's Office here. The motion of Baszner also presents a serious problem which should be resolved prior to going forward to a lengthy trial as to him. Mr. Canale's representation of his interests was nominal, minimal and of no real consequence so far as revealing strategy and confidences are concerned.

In sustaining the motion, this Court goes on record, nevertheless, to observe that it appears that Mr. Canale, an experienced attorney of high repute in this community, Mr. Cody, the United States Attorney, and the prosecutor, Mr. Dycus, have persuaded this Court that each acted in good faith and that no breach of confidence as to any defendant has occurred based on the proof before us. This is a case of first impression apparently in this Circuit. *Manuel* v. *Salisbury*, 497 F.2d 388 (6th Cir. 1974) involves a related issue in which a habeas corpus applicant had been unable to demonstrate more than an "inadvertent" conflict and no actual disclosure of confidences. No member of the prosecu-

tor's former firm actually defended the complaining part at the trial and this was noted particularly by two panels of the Sixth Circuit who considered that matter. 497 F.2d 389, 446 F.2d 456 (1971).

We grant defendant Caggiano's motion reluctantly, but we overrule the motion of other defendants because there is no showing that their interests are actually prejudiced, and they have no actual attorney-client relationship that has been violated,[3] or may have been violated. Because of the uncertainties involved in going forward to trial of co-conspirators, as well as the uncertainty as to Wolfson's physical status, the trial date will be rescheduled to a later date. We note that defendants and their counsel have waived any claim of speedy trial violation under these circumstances, and the time involved in any appeal from this Order would be considered excludable time. This would appear to be a final decision and subject to an immediate appeal under 28 U.S.C. § 1291 and/or a proper subject for certification of a controlling question of law under 28 U.S.C. § 1292(b). If appeal were taken, it is hoped it may be taken and heard on an expedited basis for guidance for the Court (and the office of the United States Attorney for the Western District of Tennessee) in proceeding further. Of course, the United States Attorney's office and Mr. Dycus are not disqualified from handling any appeal from this decision relative to Caggiano. *See Melamed* v. *ITT Continental Baking, supra,* and *General Electric* v. *Valeron, supra.*

It is so ORDERED this 24th day of December, 1980.

HARRY W. WELLFORD, JUDGE
UNITED STATES DISTRICT COURT

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[3] We do not consider Baszner's confidences to have been revealed to Canale, nor is there any presumption that they have been.

Appendix C.

AFFIDAVIT.

IN THE

United States District Court
For the Western District of Tennessee Western Division

UNITED STATES OF AMERICA	)	
	)	
VS.	)	No. 77-20201
	)	
GABRIEL ROBERT CAGGIANO	)	

AFFIDAVIT OF GABRIEL ROBERT CAGGIANO

STATE OF TENNESSEE	)
	)
COUNTY OF SHELBY	)

Comes now Gabriel Robert Caggiano, a person with whom I am personally acquainted and who states under oath as follows:

I engaged Phil M. Canale, Jr. to represent me in the instant case in November, 1977. Mr. Canale represented me at the first trial which resulted in a hung jury. The second trial was set for August 20, 1979 and as of said August 20, 1979 Mr. Canale had been paid the sum of $25,166.09 and, having been compensated and satisfied, he was ready, willing, and able to represent me at this time. It was then decided to take an appeal based on a double jeopardy issue and Mr. Canale further represented me in the formulation of said appeal.

On March 18, 1980, I had occasion to speak to Mr. Canale in connection with a decision by the Appeals Court in determining that my appeal was not frivolous and it did have merit, when Mr. Canale told me he was glad that I had called because he had something he wanted to tell me. He told me that Mike Cody had asked him to join the staff of the U.S. Attorney's Office in Memphis. I was perplexed by his statement. I then asked Mr. Canale what would be his position in regard to my case, to which he answered that Mike Cody had told him that he, Mr. Canale, could represent me while working for the government. Of course, being an attorney myself I was very skeptical about Mr. Canale's response and said, "Phil, I hope you are not going to leave me because you know my financial predicament and I cannot afford to obtain other counsel. Because of your knowledge of the case and money already expended, over $26,000, there is no way I could possibly afford to get someone else to represent me." Mr. Canale assured me he would not leave me.

Phil Canale then contacted me by letter dated April 16, 1980 in which he stated that there was a distinct possibility that he might get appointed as an Assistant U.S. Attorney in Mike Cody's office and if this should come to pass, we would have to further discuss his continued representation of me in the pending matter.

I had not had an opportunity to answer that letter because of the dilemma I found myself in due to the actions of the U.S. Attorney, Mike Cody, who unequivocally, was attempting to take my attorney away from me, when I received another letter from Mr. Canale dated May 14, 1980 in which he informed me that the Appeals Court had set a date of June 4, 1980 for argument of my appeal and that Mr. Kizer would present the argument at that time. He further requested that I send expense money for the appeal, which I did. Mr. Canale then stated in this letter that his appointment as an Assistant U.S.

Attorney had been approved and that he was going to be sworn in on May 16, 1980. Further stating, he said that in the event that it developed that he could still represent me in this matter after the change, he needed a definite written commitment from me that regardless of his new position, I still desired that he continued to represent me in any subsequent trial of this matter.

On May 20, 1980 I wrote Mr. Canale a letter with certain issues to be presented before the Appeals Court. I also enclosed a $500 check to be used for the appeal. I expressed to Mr. Canale my concern about my limited financial resources and that it would be necessary that he continue to represent me with which he was in agreance, because as I had explained to him, to obtain completely new counsel in this particular case would financially disastrous for me. On June 4, 1980 I went to Cincinnati to hear arguments presented by Mr. Kizer before the Court of Appeals. Right after the argument I spent a short time with Mr. Kizer outside the courthouse. I thanked Mr. Kizer for having presented his arguments and for his efforts.

Mr. Kizer then informed me that Mr. Durard was going to file a motion to disqualify the United States Attorney's office for conflict of interest, due to Mr. Canale's taking a position with that office. I expressed my confusion to Mr. Kizer, and told him that I did not understand how Mr. Canale could still represent me while working for the United States Attorney who is prosecuting me. Mr. Kizer told me, in confidence, that he had been told by Mr. Canale, that Mike Cody had asked Phil Canale to have dinner with him the previous Thursday to discuss Mr. Canale's position in this case. And the fact that he, Cody, had made a serious mistake when he advised Mr. Canale that he could still represent me in the matter while working for the government. Mr. Kizer stated that Mr. Canale would probably call me in regard to the meeting. I did not hear from Mr. Canale in this regard.

My appeal on the double jeopardy issue was denied by the Appeals Court on June 13, 1980 and I was notified accordingly by Mr. Kizer by letter dated June 17, 1980. Realizing that I had only thirty days in which to file a Petition for a Writ of Certiorari, and not having heard from my attorney as to what action to take, I called Mr. Canale's office on July 8, 1980 at 10:20 a.m. for the purpose of asking his advice as to whether or not I should file for a Writ of Certiorari. The secretary told me that Mr. Canale was at the U.S. Attorney's office and suggested that I speak to Mr. Kizer. But, since Mr. Kizer was not in the office, she would have him call me.

Mr. Kizer called me from his vacation spot in Arkansas and advised me to speak to Phil Canale and to call him at the U.S. Attorney's office for instructions. I inquired of Mr. Kizer if it would be proper for me to call Phil Canale at the U.S. Attorney's office to which he answered that it would be perfectly alright.

On July 9, 1980 at 12:33 p.m. I called Mr. Canale at the U.S. Attorney office and inquired whether it was proper for me to call him there; he said it was alright. I asked his advice as to whether or not I should file for a Writ of Certiorari and he advised me not to take the appeal. He informed me that Mr. Baszner was taking the appeal and felt that if Mr. Baszner got a favorable decision, it would reflect on me. I questioned Mr. Canale on this because I felt that Mr. Baszner's double jeopardy issue was different from mine and could not see how the decision he would get from the U.S. Supreme Court would resolve my double jeorpardy issue. Mr. Canale stated that if Mr. Baszner was successful, that decision would also apply to me. Then I asked Mr. Canale what I should do in the meantime and if I should start preparing myself for another trial to which he answered that I should just wait for the course of events to take effect.

On or about the second week of October, 1980 Mr. Baszner had called me to say that his Petition for a Writ of Certiorari had been denied and shortly thereafter, I received notice that a report date had been set for December 15, 1980 and a trial date for January 5, 1981. I had not been contacted by either Mr. Canale of Mr. Kizer. Therefore, on October 28, 1980 at 4:19 p.m. I called Mr. Canale at the U.S. Attorney's office to discuss the upcoming trial. His secretary informed me he was trying a case in Jackson, Tenn. and gave me the number of the U.S. Attorney office in Jackson. At 5:07 I called Mr. Canale at the number I had been given and was told by the secretary there to call Mr. Canale at the hotel where he was staying. At 8:32 p.m. I called Mr. Canale who told me he was expecting my call. Mr. Canale was very polite and cordial, as always, and inquired about wife's illness. I then asked him directly about his representing me at the up-coming report date and trial, to which he answered that he would not be able to represent me. I reminded him of our discussion of March 18, 1980 when he indicated that he could still represent me even if got appointed as an Assistant U.S. Attorney, which I had questioned, and that he told me then he would not leave me. He stated, "Bob, you know I can't represent you." I asked Mr. Canale what I should do now and he said that he had spoken to Mr. Kizer about this and that Mr. Kizer would gladly represent me if we could make some arrangement. He indicated that I should be in receipt of a long and detailed letter, and that I should call Mr. Kizer upon receipt of same.

Mr. Canale went on to say that there are a number of issues which could be considered to be favorable to me now which were not present in the prior trial; namely, 1) Mr. Dycus' appreciation of the approximate four-hour meeting I had with him on August 4, 1979 and the fact that Mr. Dycus now believes that I did write the lease between W.W.P. Leasing and Presley. 2) The fact that Vernon Presley had sent his at-

torney, Beecher LSmith, to inform Dycus that I had done the Presleys no wrong. 3) The fact that a number of witnesses, and especially Vernon Presley had died in this case after the trial date was continued from April 2, 1979 to August 20, 1979 and the fact that Vernon Presley would have been my witness.

(In regard to the meeting with Mr. Dycus on August 4, 1979, said meeting had been requested by Mr. Dycus through my attorney, Mr. Canale. Mr. Dycus asked me to go through my entire involvement with this transaction after which he said that he was convinced that there was a conspiracy, but excluding me. He believed I was called down from Boston and did write a legal document, the lease between Presley and W.E.P. Leasing. I left the meeting with a feeling that now that Mr. Dycus understood the entire transaction, he would make a decision that I had not committed any crime and decide not to proceed with another trial).

Continuing my telephone conversation with Mr. Canale of October 28, 1980 I also questioned Mr. Canale about the Speedy Trial Act and the Sanctions which went into effect July 1, 1980 throughout the United States. Mr. Canale advised me that Sanctions in the 6th District of Western Tennessee would not go into effect until July 1, 1981, although he felt that I should have been tried within the 180 days and that even under the old rule, I should get the benefit of Speedy Trial. He stated he would discuss this with Mr. Kiser.

Mr. Canale then asked me how Mr. Baszner was doing. I informed him that attorneys Durand and Collins were going to file a Motion to Disqualify the United States Attorney's Office on the basis of his appointment with that office. He said he was aware of their intentions. I informed him about the fact that they asked me whether I would file such a motion. I told Mr. Canale, I honestly did not care to file such a motion unless it was absolutely necessary. I expressed my feelings

about him and the dilemma I am faced with and the fact that I must consider not only myself, but my wife's health and four children. I thanked Mr. Canale for his kind remarks and his advice.

On or about the second week of November, 1980 I received a letter from Mr. Kizer in which he states that in order for him to proceed to represent me in the up-coming report date and trial I must bring my financial obligation up to date for any moneys due on the case and present him with a substantial sum for the new trial. I called Mr. Kizer and informed him I did not have the financial capabilities to pay him now but that I did have accounts receivables which could materialize in cash in the very near future. Mr. Kizer suggested that I call him by December 1, 1980 and let him know what I intended to do. I contacted Mr. Kizer during the week of December 1, 1980 and informed him I might be able to give him a portion of the moneys he requested and asked him what figure would satisfy him temporarily and still represent me at the report date. Mr. Kizer informed me he had to have all of the moneys he had requested and within a few days, thereafter, I received copy of a Motion to Withdraw which he filed with the Court December 2, 1980.

The foregoing statement is made to the best of my recollection.

Further, affiant saith not.

STATE OF TENNESSEE)
COUNTY OF SHELBY)

_____
Gabriel Robert Caggiano, Affiant

SWORN TO AND SUBSCRIBED before me this 18th day of December, 1980.

Arthur Matthews
NOTARY PUBLIC

My Commission Expires:
4-10-83

APRIL 16, 1980 — LETTER

CANALE, WALSH, KIZER & GAERIG
ATTORNEYS AT LAW

PHIL M. CANALE, JR.
WILLIAM E. WALSH, JR.
EDWARD A. KIZER
EUGENE C. GAERING

SUITE 3310
ONE HUNDRED NORTH MAIN BUILDING
MEMPHIS, TENN. 38103

AREA CODE 901
522-8443

April 16, 1980

Mr. Gabriel Robert Caggiano
Attorney at Law
69 Canal Street
Boston, Massachusetts 02114

Dear Bob:

Thank you for your recent letters and the material enclosed therein. Tony and I also thank you for your check in the amount of $500.00, and as I advised you on the phone, we applied most of this amount to the expenses which have been incurred thus far regarding your Appeal to the Sixth Circuit. I have had communication with Kemper Durand regarding all of the aspects of the case which you mentioned to me.

Per your request, I am enclosing herewith copies of the Suggestion that Joe Dycus filed with the Sixth Circuit and our response to his Suggestion. As I recall, I have previously sent you a copy of the Order of the Court of Appeals denying Mr. Dycus' Suggestion. I have not included in the enclosures the statement of the case and the Brief which Mr. Dycus filed as a part of his Suggestion, since same is accumulative and only repeats portions of the Brief which he previously filed, a copy of which you already have.

Mr. Gabriel Robert Caggiano
April 16, 1980
Page Two

I appreciate the complete information you wrote me regarding Mary, and I do sincerely hope and pray that she is still progressing nicely, and that you and the children are still doing well. Tony's mother-in-law died in Arkansas day before yesterday and was buried yesterday, so Tony is now back in the office.

As I informed you on the phone in one of our conversations recently, there appears to be a distinct possibility that I may soon be appointed as an Assistant United States Attorney in Mike Cody's office here in Memphis, and if this should come to pass, we will of course will have to further discuss my continued representation of you in the pending matter.

Again, trusting you and your family are continuing to get along excellently,

I remain,

Sincerely yours,

CANALE, WALSH, KIZER & GAERIG

Phil M. Canale, Jr.

PMC,Jr./slw
Enclosure

MAY 14, 1980 — LETTER

CANALE, WALSH, KIZER & GAERIG
ATTORNEYS AT LAW

PHIL M. CANALE, JR.
WILLIAM E. WALSH, JR.
EDWARD A. KIZER
EUGENE C. GAERING

SUITE 3310
ONE HUNDRED NORTH MAIN BUILDING
MEMPHIS, TENN. 38103

AREA CODE 901
522-8443

May 14, 1980

Mr. Gabriel Robert Caggiano
Attorney at Law
69 Canal Street
Boston, Massachusetts 02114

Dear Bob:

For your information, I am enclosing herewith a copy of a notice from the United States Court of Appeals for the Sixth Circuit that your case, as well as that for Ray Baszner is set for oral argument in the Court of Appeals on June 4, 1980.

Tony Kizer will handle this matter in the Court of Appeals, but it is absolutely necessary that you immediately forward to Tony a sufficient amount of money for his airfare, hotel room, and per diem.

As I have discussed with you previsously, my appointment as an Assistant United States Attorney here in Memphis has been approved, and I will be sworn in as such on May 16, 1980. In the event that it develops that I can still represent you in this matter after the change, I would need a definite written commitment from you that regardless of my new position, you still desired that I continued to represent you in any subsequent trial of this matter.

Trusting that Mary is still continuing to improve,
I remain,

Sincerely yours,

CANALE, WALSH, KIZER & GAERIG

Phil M. Canale, Jr.

PMC,Jr./slw
Enclosure

[FACSIMILE OF CHECK]

GABRIEL R. CAGGIANO
CLIENTS FUND ACCOUNT 1137
69 CANAL STREET
BOSTON, MA 02114 5-20/110

May 20, 1980

PAY
TO THE
ORDER OF Phil M. Canale, Jr., Esquire $500.00*

----------Five Hundred and no/100---------- Dollars

[BANK LOGO] Shawmut
Bank of Boston, N.A.
Boston, Massachusetts 02110

/s/ Gabriel R. Caggiano

FOR DEPOSIT ONLY
PAY TO THE ORDER OF

Union Planters National Bank

CANALE, WALSH, KIZER, & GAERING
5100 POLAR AV. SUITE 2103
MEMPHIS, TN 38137